No. 74

IN

The Supreme Court

of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED FREIGHTWAYS, INC., AND OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC.,

Appellants

vs.

FIERCE AUTO FREIGHT LINES, INC., LOS ANGELES-SEATTLE MOTOR EXPRESS, ANGELO COLLETTI, DOING BUSINESS AS COLLETTI FAST FREIGHT, PACIFIC MOTOR TRUCKING COMPANY AND PACIFIC SOUTHWEST RAILROAD ASSOCIATION

On Appeal from the District Court of the United States for the District of Oregon

BRIEF FOR CONSOLIDATED FREIGHTWAYS, INC., and OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC.

KEYSTONE PRESS

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OPINIONS BELOW

The opinion of the District Court (R. 64 to 72) appears in 57 F. Supp. 192. The report of the Interstate Commerce Commission (R. 9 to 44) was not printed. A memorandum

report of the final action taken appears in 42 M.C.C. page 858.

GROUNDS ON WHICH JURISDICTION INVOKED

The jurisdiction of this Court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 219, 220 (28 U.S.C. 47a), and Section 238 of the Judical Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U.S.C. 345). This is an appeal from the final decree of the District Court for the District of Oregon, entered February 5, 1945, suspending certificates of public convenience and necessity issued by the Interstate Commerce Commission to two motor carriers, Consolidated Freightways, Inc. (hereinafter referred to as "Consolidated") and Oregon-Nevada-California Fast Freight, Inc. (hereinafter referred to as "O.N.C.") and remanding both cases to the Commission for further hearing and the taking of certain action designated in the District Court's opinion. (R. 81-2-3.)

Petition for appeal was filed April 3, 1945 (R. 84-5) and the appeal was allowed the same day (R. 91). Probable jurisdiction was noted by this Court on June 11, 1945. (R. 2621.)

STATEMENT OF THE CASE

1. Proceedings Before Interstate Commerce Commission.

O.N.C., with headquarters at San Francisco, has been a common carrier of freight by motor vehicle since 1929 (R. 170). Before the extension made upon the certificate in question here its operations were, principally, San Francisco to Medford and Klamath Falls, Oregon, and San Francisco-Elko, Nevada (R. 178).

Consolidated has also been operating since 1929 (R. 1540). Its principal routes radiated out of Portland, Oregon, south to Medford, Klamath Falls and Marshfield, Oregon; east to Twin Falls, Idaho; north to Seattle, and northeast to central and eastern Washington points. It also operated from San Francisco to Twin Falls and from Seattle to Spokane and east through Montana (R. 11). For the most part both companies serve all intermediate points on these routes. A marked map has been submitted with the Government's brief for the convenience of the Court and these general descriptions are not intended to be meticulous.

Through a connection at Medford the two carriers gave a joint-line through service between the California points served by O.N.C. and the points north of Medford served by Consolidated (R. 176). At first the local business along the route represented the greater part of each line's business and the volume of freight interchanged between them was small. Gradually, however, the picture changed until the joint-line traffic exceeded the local (R. 1547). "It is a case of the tail wagging the dog now." (R. 1547.)

This joint-line truck service between San Francisco and Portland, Seattle, Spokane, etc., was one of the first to be offered (R. 2525). For a considerable period it was the only regularly scheduled daily service (R. 2525). At the time of the hearings, it was handling the bulk of all traffic moving by motor vehicle between San Francisco and Portland and the business was progressively and rapidly increasing (R. 39). As the volume of interchange business increased, however, so also did the time required to transfer the freight at Medford. It had to be unloaded and checked off the vehicles of one and reloaded and checked on the other's trucks and trailers (R. 856). It also had to be rebilled (R. 862). This rehandling at approximately the half way point between San Francisco and Portland, in addition to causing delay and extra expense, meant more loss and damage claims (R. 1925, 1501). Efforts were made to lessen the difficulties. The two lines worked out a through billing plan but, because it required separate billing machines, it was not practical to use it in any but the larger originating stations (R.2311). They worked out an arrangement to interchange loaded trailers (R. 847-8) but were unable to exchange motive equipment (R. 849). Consolidated wanted to interchange all freight destined to central and eastern Oregon and Washington points at Klamath Falls, but the advantages to Consolidated were more than offset by the disadvantages to O.N.C. and that plan was abandoned (R. 838-9).

Other motor carriers, principally the appellees herein, came forward and applied to the Commission for authority to operate through single-line service between Seattle or Portland and San Francisco or Los Angeles. They urged the superiority of a through service as compared to the O.N.C.-Consolidated joint service. Mr. Pierce, in support of his company's application, testified as follows:

> "Our service has a distinct advantage to the shipping public over that of any other existing carrier operating daily between Oregon and California points for the reason that we are the only termini common carrier handling general merchandise over the entire route which we cover operating under one management.
>
> "The Oregon-California Fast Freight Lines operate between San Francisco and Medford, and their service is of the same type as we are rendering.
>
> "The Consolidated Freight Lines operate between Portland and Southern Oregon points and they likewise render the same type of service in this particular territory. These two companies connect at Medford, and transfer freight moving to and from California and Oregon points. On freight that originates in California moving north of Medford, or on Oregon Freight destined to California points south of Medford, it is necessary for a transfer of freight at Medford." (R. 1500.)
>
> "However, since our tonnage has increased so materially, the most of our equipment has been licensed in both states, and we are now loading the merchandise originating in Portland and San Francisco destined to

points north and south of Medford, in such a manner that the equipment can be routed directly through to destination without the necessity of transferring the freight at Medford. There are exceptions to this rule, but we are making a practice of this procedure whenever possible, as it not only eliminates the necessity of rehandling the freight, which causes more loss and damage claims, but eliminates the hours of labor which are necessitated in the transfer of merchandise. This practice, therefore, is not only more beneficial to the shipper, but effects a great saving to the company. As an example of this advantage to the shipper, we have had many requests from shippers to route their merchandise on a through truck if possible, eliminating the necessity of rehandling." (R. 1501.)

Consolidated and O.N.C. appeared as protestants in the Pierce, the Los Angeles-Seattle Motor Express, the Colletti Fast Freight and the Pacific Truck Express cases and contended that their joint service was adequate for the needs of the shippers (R. 2449, 2526, 2446, 1463). The Commission found in all of these cases that it was inferior to a through single-line service. The Commission's discussion of the point in the Los Angeles Motor Express case, for instance, noted the contentions of O.N.C. and Consolidated "that they have sufficient equipment available to meet the requirements of the public", but found need for that applicant's proposed through service anyway, saying, "However, protestants are not in a position to render single-line service * * *." (R. 2526; 29 M.C.C. 81, 89.)

In the face of these Commission adjudications that the joint-line service was inadequate, even though capable of transporting all freight tendered, Consolidated's president set about to form an association of connecting lines which had for its purpose the correction of the defects (R. 1438-9). O.N.C. was invited to become a member but declined (R. 2436). Then Consolidated applied to extend south from Medford and Klamath Falls to San Francisco[1] (R. 176) and O.N.C. filed an application to extend from Medford and Klamath Falls to Portland (R. 177). Neither line opposed the other's request[2].

They reasoned that, if they divided their former joint business, each would give a much better service and make a better profit (R. 844). It would require less equipment to transport half of the traffic all the way than to transport all of it half way, because the vehicles would not be standing idle at Medford as was necessary in the joint operation (R. 1544). The rehandling and rebilling expense at Medford, estimated at $1500 to $1600 per month, would be saved (R. 874).

Appellees Pierce Auto Freight Lines, Inc., Los Angeles-Seattle Motor Express, and Angelo Colletti are common carriers by motor vehicle, operating *inter alia* between San

1 Consolidated also applied to extend south from Coquille, Oregon, over U. S. Highway 101 to San Francisco (which was denied) and for an alternate route from Lakeview, Oregon, to Redding, California, which was granted.

2 The applications to the Commission were not introduced in evidence by plaintiffs below.

Francisco and Portland. Appellee Pacific Motor Trucking Company is a subsidiary of the Southern Pacific Company (R. 1278), and, as successor in interest to Pacific Truck Express (R. 1279), performs certain common carrier motor vehicle operations which are auxiliary to the rail service of the Southern Pacific Co. (R. 1281). Appellee Pacific Southwest Railroad Association is an association of railroads serving the Pacific Southwest, including the Southern Pacific Company, which operates, among others, a line of railroad between San Francisco and Portland (R. 1276). These appellees were interveners in both proceedings before the Commission as protestants against the granting of Consolidated's and O.N.C.'s applications and brought this suit to set aside the Commission's order. Consolidated and O.N.C. intervened in the District Court in support of the Commission's order and have joined in the appeal to this Court (R. 54, 60).

Hearings were held on both of these applications during the summer and early fall of 1940. They were not consolidated for trial, but they were treated as "companion" cases in that certain evidence given in one case was incorporated in the other as exhibits or by stipulation or reference. The testimony of four O.N.C. shipper witnesses who had planned also to support Consolidated was introduced in Consolidated's case as an exhibit (R. 2336). The cross-examination of O.N.C.'s president was offered in Consolidated's case (by counsel for Southern Pacific and

its subsidiary, Pacific Truck Express) as an exhibit (R. 2358) and his testimony on direct was incorporated by reference at Consolidated's insistence (R. 2369).

Appellees put their case in the O.N.C. record and then, at their request, it was stipulated to become, by reference, a part of Consolidated's record (R. 2335). The two hearings consumed 21 days, Consolidated offering 53 witnesses and 17 exhibits and O.N.C. 72 witnesses and 12 exhibits. The protestants offered 37 witnesses and 68 exhibits, which evidence, by the above-mentioned stipulation, stands in each record.

In each case the Joint Board disagreed, leaving the initial decision to the trial examiner (R. 10). He wrote separate reports (R. 10). Each applicant filed exceptions and the protestants replied thereto. Plaintiffs below did not introduce the trial examiner's reports nor the exceptions (although counsel offered to furnish everything needed to make up the complete record before the Commission (R. 104)). It is, therefore, not possible to say exactly what was before the Commission on exceptions[1].

Division 5, covering both cases in one report, dated March 1, 1943, reversed the trial examiner and ordered the issuance of certificates to each applicant. The complete Division 5 report and order appears at pages 10 to 45 of the record. Appellees, by a joint petition for review, re-

1 This deficiency is important with relation to Division 5's failure to discuss at more length Consolidated's ability to operate the service proposed.

consideration and further hearing (R. 2485 to 2519), appealed to the full Commission and the applicants filed separate replies thereto (R. 2520 to 2580). By order dated August 2, 1943 (R. 65) the Commission denied the petition. The final certificates were issued to Consolidated and O.N.C. on September 7th and 15th, 1943 (R. 45, 47) and operations were instituted by each over the extended routes authorized (R. 94).

The certificates issued to O.N.C. authorized that carrier to extend its routes north from Medford and Klamath Falls to Portland, Oregon, and Vancouver, Washington (R. 48). The certificate given to Consolidated authorized extension south from Medford and Klamath Falls to San Francisco (R. 46). In each case operation was also authorized over certain alternate highways.

The Division 5 report, of which appellees complained, covers thirty legal-size typewritten pages. Because the main issue below was appellees' contention that this report "scrambled" the two records and dipped into one to support the result reached in the other, it is necessary to study closely its arrangement and composition. It methodically deals with the issues in the two cases as follows:

It first relates the proceedings before the joint board, the fact that the examiner wrote separate reports, that each applicant filed exceptions and that the protestants replied. The first paragraph concludes "The issues in these pro-

ceedings are interrelated and the applications will be disposed of in one report. Our conclusions differ from those recommended." (R. 10.)

Next, in separate paragraphs, it recites the authority requested by each applicant (R. 11).

The next two paragraphs are devoted separately to describing the then existing operations of Consolidated and O.N.C.

Then follow several paragraphs covering the background history and events leading up to the filing of these applications, including reference to Consolidated's efforts, through the planned association of connecting lines, to eliminate many of the difficulties encountered in interchanging freight (R. 11 to 14).

Then the report devotes seven paragraphs to discussing the service proposed by Consolidated, and concludes with reference to a two-page appendix. The paragraph summing up the improvements to be realized reads as follows:

> "The proposed service will enable Consolidated to render as much as 24 hours faster service to 246 points, typical of which are Wallace, Idaho; Missoula, Mont.; Yakima, and Lakeview. Gold Beach and Port Orford, Oreg., will receive a day-and-a-half faster service. Roseburg, Eugene, and 66 other points will receive half a day faster service. Points in California intermediate between San Francisco and the Oregon-California State line will receive faster service on southbound traffic.

> One hundred and seventy points will receive 24 hours faster service than is now available by any means of freight transportation." (R. 15.)

The appendix C to the report compares the service from San Francisco Bay points proposed by Consolidated with all services then available including the O.N.C.-Consolidated joint service (R. 43-44).

Following this the report spends four full paragraphs upon the improvements proposed by O.N.C. and discusses the means by which such improved service would be made available (R. 16-17).

The report then proceeds with the general statement, "Approximately 120 shipper witnesses were called by one or the other of the applicants, although some few testified in behalf of both applicants. Sixteen shipper witnesses testified for protestants." Then in the next paragraph the following preliminary appraisal of the issues is found:

> "Applicants' shipper witnesses, as a whole, are engaged in shipping or receiving general commodities at numerous points in California, Oregon, and Washington, and at some few points in Idaho. But the value of most of the shipper testimony is difficult to appraise. In finally deciding the questions presented herein, applicants' cases rest on (1) their proposed speed-up of service, (2) their use of mechanically-refrigerated equipment, (3) their service to intermediate points, (4) their proposed single-line service as against joint-line service, and (5) in respect of Consolidated, its

proposed through operations between San Francisco and points in eastern Oregon and Washington, between the Coos Bay area and San Francisco over the Coast Route, and to and from Lakeview. Each one of these will be discussed separately, but before so doing, the present service of protestants will be considered as well as certain of their contentions in respect of the proposed service." (R. 17-18.)

The discussion of the authority held and service given by each of the protestants takes up 32 paragraphs and is unusually detailed (R. 18 to 27).

The opinion testimony of a professor of economics dealing with the benefits which the public may expect from a faster service is discussed in one paragraph (R. 27). This testimony is contained only in the Consolidated record. The witness was not supporting either application (R. 2123-4), his opinions being confined to purely hypothetical questions.

The next six paragraphs discuss the feasibility of the proposals to speed up the service and the contentions of protestants in regard thereto. (R. 28-29.)

"We conclude that applicants should be given the benefits of whatever doubts may exist as to their ability to maintain the proposed time schedules. If the proposed speed-up of service is practical for applicants, it also is feasible for other carriers competently managed. Although added competition may force them to do it, none of the protestants proposes a like service." (R. 29.)

Then follows a general discussion of the evidence relating to the need expressed by the witnesses in each case for more refrigerated service. The fast schedules proposed would include rapid transportation of freight requiring refrigeration. It was shown that there is a large volume of such traffic from Oregon and Washington (R. 29). About July, 1939, Consolidated inaugurated a refrigerated service with thermostaticly controlled units. Although it has been building refrigerated equipment at the rate of four or five a month, it has not been able to meet the demands for refrigerated service by shippers of frozen fruits and vegetables (R. 30). Five of O.N.C.'s trailers are mechanically refrigerated (R. 16). So far as this record shows, the applicants were the only carriers providing mechanical refrigeration, except Pierce Auto Freight Lines, Inc., which had one unit so equipped (R. 30).

The fact that shipper witnesses complained of the failure of protestants to serve intermediate points along the route was next developed. The thoroughness of the Division's analysis and consideration of protestants is shown here:

> "In August, 1940, L.A.S. had no traffic to or from Grants Pass, Oreg., or any other point in Oregon south of Eugene. During that month it grossed over $33,200, of which $30.01 represented hauls between San Francisco and Eugene, and $30.89 between San Francisco and Salem. L.A.S. is listed in the telephone directory of Seattle, Tacoma, Portland, San Francisco, and Los Angeles but not at any other Oregon or California

points on the routes involved. Colletti is listed in the telephone directory of Seattle, Portland, Oakland, and Los Angeles. Less than 1 percent of Cascade's traffic moves between San Francisco and points in Oregon south of Portland. This carrier has no telephone listings at any intermediate point between San Francisco and Portland." (R. 30-31.)

The next four pages of the report (R. 31 to 34) deal with the evidence and contentions of each applicant and those of the protestants with respect to the difficulties and deficiencies of the former joint service. There is in this treatment a careful consideration of the evidence given by each and a clear indication that each applicant openly assumed that both applications would be granted. The following excerpts are illustrative :(R. 31-32, 33)

"As stated, O.N.C. and Consolidated have interchanged freight at Medford for over 11 years and at Klamath Falls for over 6 years to give joint through service between points served by each. Since July, 1939, about one-third of the tonnage has been handled through interchange of trailers. At first, the amount of interchange traffic was small and Consolidated's principal business was of a local nature to and from Medford. Apparently, O.N.C.'s principal business also was local. The interchange business has since increased until it far exceeds that of the local business. At the time of the hearing, a daily average northbound tonnage of approximately 110,000 pounds of California freight was being interchanged at Medford. Northbound tonnage increased from 745,795 pounds in January, 1938 to 2,523,195 pounds in May, 1940, an

increase of over 200 percent. Southbound tonnage increased from an estimated 251,162 pounds in January, 1938 to 1,370,380 pounds for May, 1940, an increase of over 400 percent. Consolidated's president believes that in the event its application is granted this tonnage would be split equally. O.N.C.'s president expressed the belief that his company would retain 65 percent of the northbound tonnage and that Consolidated would retain 65 or 70 percent of the southbound tonnage.

"Both applicants and protestants introduced evidence pertaining to the alleged advantages and disadvantages of the joint service. Much of it is argumentative. Apparently the contentions may be summed up by stating that it is protestants' position that the source of these proceedings lies in the refusal of O.N.C. to join Freightways and that the objectionable features claimed to result from the interchange are within the power of these two applicants to correct; while it is applicants' position that these proceedings arose from a desire on their part to give a better service."

"O.N.C.'s president expressed the belief that because of delays in transfer including rebilling and checking, and the handling of a number of pieces of property belonging to different consignors or consignees, an arrangement for the equipment of one carrier to be ready and available to transfer the lading and immediately move on would not be as practical as the operation of through equipment by one carrier. He is of the opinion that rebilling causes only a small part of the delay, most of which he believes is due to interchange of lading; that O.N.C. will be better off financially if the requested certificate is granted, notwithstanding the possible split of the available ton-

nage; that the delay at Medford could be reduced by one-third by efficient operation of both applicants; and that the joint service could not be improved sufficiently to give service equal to that which is proposed herein.

"Consolidated wants all of its freight destined, for example, to Spokane, Yakima, and Wenatchee, Wash., loaded in one piece of equipment, so that when it reaches Medford it will all be together for checking and can be loaded right through from Medford to destination. This method of operation is not satisfactory to O.N.C. as it delays O.N.C. in San Francisco because it has to hold the trucks until the last pick-ups are delivered at its terminal, which is between 7 and 8 p. m."

Then follows a discussion of the evidence relating to Consolidated's proposed schedules through Klamath Falls to central and eastern Oregon and Washington points and the public testimony of need for it. Connections with this route would be made at Arlington with Consolidated's already existing schedules for such points as Pendleton, La Grande, and Baker, in eastern Oregon. This route to San Francisco through Klamath Falls is approximately 140 miles shorter than that over which the traffic then moved, i.e., through Seattle or Portland and Medford, the highway is straighter, faster, and less congested, and its use would enable Consolidated to provide service a full day faster than any then available (R. 34). At the time of Consolidated's application, there was no service, either

through or joint, from the important inland territory above described to San Francisco over this shorter route through Klamath Falls. Consolidated had been unable to effect arrangements for interchange of this traffic at Klamath Falls. Shippers from Pendleton, La Grande, Baker, The Dalles, and Bend, Oreg., Yakima, Spokane, and Wenatchee, Wash., and Coeur d'Alene, Kellogg, and Wallace, Idaho, strongly supported this portion of Consolidated's application, pointing out that they had no through service to San Francisco over this faster and superior route (R. 35.)

Following this detailed coverage of the issues, the evidence and the contentions of the parties, the report launches into what is captioned "Discussion and Conclusions." The following excerpts are reprinted to show the crystallized theory of the two cases.

> "There are submitted in evidence in these proceedings excerpts from testimony or portions of briefs wherein certain of the protestants, as well as both applicants, at one time or another, in other proceedings before this Commission involving extension of operations on the Pacific Coast, took positions directly contrary to that which they now take in the instant proceedings. For example, both applicants herein appeared as protestants in the proceeding wherein Pierce sought to extend its operations to San Francisco. At that time, applicants herein contended their joint service was satisfactory while Pierce contended that a through service was superior. In effect, protestants urge that this, together with the matters heretofore

discussed pertaining to events leading to the filing of the instant applications, establishes that the authority sought is an attempt on the part of each applicant herein to invade the territory of the other. On the other hand, it is said that the real reason for the filing of these applications is the mutual desire of O.N.C. and Consolidated to retain the business they have promoted and to share in the normal increase in that business by establishing a type of service acceptable to the public.

"To determine which of these two contentions is correct is unnecessary. Certainly any motor carrier may file an application under section 207(a) of the act and the issues would be, as in these proceedings, whether the proposed service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; and whether it can be served by an applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." (R. 37-38.)

"As seen, Consolidated and O.N.C. transport the bulk of the traffic between San Francisco and Portland. For reasons which are obvious, authority should be either granted or denied to both applicants to operate over the Valley Route. Authorizing Consolidated to operate over the route between San Francisco and Klamath Falls would enable it to operate between Portland and San Francisco.

"Each of the two applicants herein offers, over the Valley Route, an expedited through single-line service as well as service to and from all intermediate points. There is no doubt but that a number of shippers desire such proposed services. Each applicant also oper-

ates units equipped with mechanical refrigeration, which service certain of the shippers desire for the proper transportation of their shipments. The proposed service will enable shippers to obtain goods more rapidly, resulting in an increase in their businesses. Some of the shippers estimate an increase in business amounting to several thousand dollars. Practically all of the witnesses prefer a single-line through service. Some of them have used the services of existing carriers and have not found them satisfactory principally because of improper refrigeration or lack of service to intermediate points. The latter complaint also pertains to the fact that protestants come through the intermediate points with full loads and shipments have to be held. It is true, as pointed out by protestants, that some of the shippers have not used available through single-line service and further, that some were not familiar with the services offered by existing carriers. On the other hand, some witnesses have used the existing service and found it unsatisfactory; and some have used the service of P.T.E. and found it very satisfactory, but are desirous of obtaining a single-line through service to replace it, for, as stated, P.T.E. no longer operates a through service between the points in question. That some of the witnesses were not familiar with the fact that Pierce was rendering daily service between Portland and San Francisco is readily understandable from the facts heretofore discussed.

"Protestants also argue that if these two applicants would be more cooperative, arrange for through billing to and from all points, and exchange power equipment as well as trailers, they could render the services proposed herein. Through trailers represent no savings in time because they have to be held until the power

equipment arrives. If the power equipment is a truck, the lading must be transferred from the truck. Each applicant also has its own ideas as to the proper type of equipment to be used as heretofore explained. It is noted that some of the protestants agree with Consolidated, while some agree with O.N.C. in this matter of proper equipment." (R. 39-40.)

Concerning the question whether the grant of both applications would impair the ability of existing carriers to render adequate service, the Commission made the following findings:

"Protestants allege that the granting of authority to operate over the Valley Route, especially as to southbound traffic, would further divide the available traffic and impair their ability to render adequate service. But the traffic northbound as well as southbound is increasing, and from the facts heretofore discussed in respect of the increase in business enjoyed by the motor-carrier protestants, it would be difficult to conclude that authorizing applicants to perform the operations set forth in our findings herein would so endanger or impair the operations of existing carriers as to be contrary to the public interest. Certainly, there is no evidence of any impairment of existing service if Consolidated is authorized to extend its route southward from Klamath Falls, for there is now no service through or joint, between points in central and eastern Oregon and Washington over the proposed routes.

"The operations of protestants have been described in some detail. Of the motor-carrier protestants, there is only one—Pierce—which is authorized to transport

general commodities to and from all intermediate points along the Valley Route. Pierce did not reinstitute daily operations to and from San Francisco, however, until after the filing of these applications and but a few weeks prior to the hearings herein. Shipper witnesses generally were unfamiliar with the fact that Pierce's operation was daily. There are, of course, certain other motor carriers operating over this route but their authority is either (1) restricted in such a way as to preclude a finding that their service is adequate especially as to intermediate points, or (2) the record definitely establishes that their service to intermediate points, and in some instances to and from San Francisco, is at best negligible." (R. 40.)

The ultimate conclusion reached was as follows:

"In view of the foregoing, we are of the opinion that public convenience and necessity require the operations set forth in our findings herein." (R. 40.)

The findings are separately stated for each applicant, finding each "fit, willing and able" and that "present and future public convenience and necessity" require each extension.

2. Proceedings in District Court

Approximately four months after final certificates had been issued to O.N.C. and Consolidated, appellees filed their complaint in the court below (January 13, 1944; R. 1). Service was not properly made upon the United States and the Commission until March 1, 1944. The prayer

(R. 9) was that the two certificates be "set aside and annulled." Ten grounds were urged (paragraphs X and XI; R. 6-7-8). Briefly summarized, they were as follows:

(1) that the Commission improperly commingled the two cases in one report and considered in each case evidence contained only in the other record.

(2) that the Commission improperly concluded that, if one application were to be granted, both should be granted.

(3) that the Commission improperly extended the "benefit of doubt" to the applicants "particularly as to their respective abilities to render the proposed services."

(4) that the Commission's report contains no affirmative findings that the protestants were unable or unwilling to provide the service proposed.

(5) that the Commission's report contains no affirmative finding that the granting of the applications would not impair the ability of existing carriers and is inconsistent with other records in that respect.

(6) that the Commission improperly concluded that inability of the two applicants to improve the joint service established the existence of public convenience and necessity for each to extend over the route of the other.

(7) that the record was stale and therefore fails to reflect conditions as of the date of the final report.

(8) that the findings are inconsistent with another report and order of the Commission in a like proceeding.

(9) that the findings of the Commission are insufficient to support the order.

(10) that the Commission abused its discretion in denying a further hearing under the circumstances.

The United States and the Commission answered (R. 48 to 53). Consolidated and O.N.C. intervened and filed answers (R. 54 to 63). An incident in the trial below which is claimed as error was the insistence of the court that all affirmative defenses set out in Consolidated's separate answer be stricken before intervention by that carrier was allowed. In the light of the findings and conclusions later entered by the lower court, the error can now be claimed as prejudicial only with respect to the refusal to consider Consolidated's defense of laches. The ruling appears at page 110 of the record.

The case was tried before the lower court April 28, 1944. At the opening of the proceedings, when asked by the Court how the factual evidence was to be presented, Mr. Ellis, of counsel for appellees, said:

"MR. ELLIS: We intend to offer in evidence the entire record for the Commission. The record is not certified. The notice given us of the hearing did not permit us time to get it to Washington and back, so we have had an understanding with counsel for the Attorney General's office, at least, that we might introduce it uncertified with the privilege and promise[1] of having it certified later.

MR. CRENSHAW: Insofar as the Commission is concerned, we would be interested in knowing whether it is a complete record in the case or not. Now which case do you have the record in, Mr. Ellis?

MR. ELLIS: I have, I believe, the complete record in both cases.

MR. CRENSHAW: The two motor carrier cases?

MR. ELLIS: The two motor carrier cases, both Consolidated and the Oregon-Nevada-California Fast Freight, with the exception of two or three exhibits which were not furnished to the parties, and which I have requested promptly from the Secretary of the Commission, but which I have not yet received." (R. 102-3.)

"JUDGE WILBUR: You expect to submit the case on the testimony taken before the Commission?

MR. ELLIS: Yes, your Honor.

JUDGE WILBUR: Both of you?

MR. CRENSHAW: That would seem to be necessary, if the Court is going to review the facts in the case, to have the entire record. I was merely trying to

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1 This promise was not kept but appellants have made no issue of the lack of certification.

be careful that we do have it. And I am sure from what Mr. Ellis says that if he does not have it here, why, he can complete it later and we would have no objection to that." (R. 103.)

The trial examiner's report and recommended order in the Consolidated case and Consolidated's exceptions thereto were not offered nor later supplied. This deficiency was not brought to the attention of appellants (who assumed that appellees' promise had been kept) until the record was assembled for submission to this Court.

Another feature of the trial below that is material to the consideration of one of the questions presented in this appeal (that the lower court erred in basing its findings that the plaintiffs had been denied a fair trial upon a theory neither pleaded nor argued and which plaintiffs were deprived of any opportunity to argue) was the cutting off of argument on any point other than that which the lower court said was the key issue. The transcript of proceedings (R. 134 to 160) shows very clearly that the Court considered as the focal point of the case the allegation that the records were "scrambled." Mr. Ellis gave what he supposed to be examples of such practice and promised that he would provide more in his brief (R. 123). The defendants were not permitted to deviate from what the Court then considered the controlling issue.

"MR. PIERCE (Attorney for the United States): We are not, of course, contending that the Commission

had any right to decide one case upon the record in another, but we think they did have the right——

JUDGE FEE: That is the charge being made here.

MR. PIERCE: That is right.

JUDGE FEE: That they decided upon the basis of the record in the other case.

MR. PIERCE: That is right. I am just considering now the general propriety of considering these two cases together in a single decision.

JUDGE FEE: What is the use of making that kind of an argument if it hasn't anything to do with the facts?

MR. PIERCE: Well, I understand that they were making that contention as well.

JUDGE FEE: They are making the contention that the evidence from two separate records was thrown together and they didn't have any notice of it." (R. 134.)

"MR. PIERCE: The point is, your Honor, if there is sufficient evidence in the Consolidated record to support the finding made with respect to Consolidated, and if there is sufficient evidence in the O-N-C record to support the Commission's finding with respect to that carrier, that is sufficient. And yet plaintiffs say that they are not urging that there is any lack of substantiality of the evidence.

JUDGE FEE: The point that I was making personally was the fact that your argument did not hitch with what they claim in this case at all. Your argument was that the Commission has a right to throw two records together, as I understood.

MR. PIERCE: I didn't say that, your Honor. I don't say they have the right to throw two records together. I say that the Commission has the right to decide two cases which are separately heard in a single decision. That does not mean that they decide each case on any record other than related to that case.

JUDGE FEE: That is not the claim that is made in this case. The claim made in this case is, specifically, that that is not what they did at all, but they took findings from one set of evidence and transferred it to the other case. *That is the only point that I am interested in hearing you on.* I am not interested in hearing a nebulous state of facts which does not affect this particular state of facts.

MR. PIERCE: I say that there is sufficient evidence in each of these records to support the finding which the Commission has made. That is, the finding in the Consolidated case was supported by the record in the Consolidated case.

JUDGE WILBUR: They concede that, but they claim the Commission took witnesses who were examined in one case by one set of attorneys and used them in another case without the knowledge of the lawyers on the other side, without an opportunity to cross examine them, or to make them witnesses in the other case.

MR. PIERCE: I don't think they did that, your Honor.

JUDGE FEE: That is what they claim." (R. 135-6.)

"JUDGE McCOLLOCH: Do you want Mr. Ellis to rebut now, if it would not use your time, to place in the record his claims showing that they did go from

one record to the other? Judge Wilbur says that will take too much of your time. *But that is the key to this case, as far as I am concerned, from what I have heard so far.*" (R. 137.)

By the time counsel for plaintiffs arose to reply there was no other point in the case. This is clear from the fact that Mr. Ellis devoted his entire closing argument to that one point. (R. 156-7-8.) Judge Wilbur called for a tabulation of some form showing the "overlapping" (R. 158)[1], and Mr. Hampson, closing for plaintiffs, referred to it, as the Court had, as "the real issue in this lawsuit," "that the Commission in determining two separate cases which were separately tried permitted itself to consider in one case evidence which was part of the record in the other case and the other case only, and vice versa" (R. 159).

September 20, 1944, the court rendered its opinion (R. 64), holding the Commission's order invalid on various grounds, remanding the proceedings to the Commission for rehearing, and meanwhile suspending the operation of the Commission's order. Shortly after the opinion was rendered, and before the court had entered a decree, the United States and the Commission filed a petition (R. 93-4) asking that the effectiveness of the decree, when entered, be stayed pending appeal. In the petition, it was called to the Court's attention that Consolidated and O.N.C. were already engaged in rendering for the shipping public the transporta-

1 Appellants can find no record of such a tabulation ever having been furnished.

tion service authorized by the Commission's certificates, which service, moreover, had been instituted by them prior to the commencement of the suit by their competitors, and it was urged that the continuance of this service constituted the status quo which should be preserved, pending appeal, by issuance of a stay. On November 10, 1944, the court rendered a memorandum opinion (R. 72) denying the petition but since it later granted a stay, this opinion is now unimportant.

On February 5, 1945, the court entered its findings of fact and conclusions of law (R. 74). On the same date it entered its decree (R. 81), remanding the proceedings to the Commission for rehearing and suspending both the Commission's order and the certificates issued pursuant thereto pending completion of the proceedings before the Commission upon the rehearing ordered.

Notwithstanding its earlier denial of a stay, the Court, on February 15, 1945, entered an order (R. 83) finding that a stay "is necessary to preserve the status quo and that irreparable damage to interveners [Consolidated and O.N.C.] and disruption of existing public common carrier services would otherwise result." By virtue of the stay, the services authorized by the certificates, inaugurated shortly after their issuance in September, 1943, have been continued without interruption.

SPECIFICATIONS OF ERRORS TO BE URGED

These intervener appellants have read the brief of the United States and the Commission and desire to adopt the argument therein contained under specifications 1 to 7 inclusive. The argument herein is intended to be supplementary thereto and an effort has been made to avoid unnecessary duplication. Specifications which these appellants wish to add or enlarge upon are that the District Court erred:

1. In basing its finding that appellees were denied a fair hearing upon a theory neither pleaded nor argued and which appellees had not urged before the Commission.

2. In holding that appellees were denied a fair hearing before the Commission because they were given no opportunity to defend against the granting of two applications.

3. In holding that the Commission considered the two applications as consolidated, intermingled the evidence of the two records in that consideration, and based its decision, in each instance, on one application, upon evidence taken from the other record.

4. In holding that the Commission failed to find that the Consolidated Company was fit, willing, and able to perform the service it proposed, and that there was no evidence of record to support such a finding.

5. In striking from the answer of Consolidated Freightways, Inc., its affirmative defense of laches and denying to Consolidated any opportunity to offer evidence to sustain said affirmative defense.

SUMMARY OF ARGUMENT

1.

The District Court, in holding that the Commission denied appellees a fair trial by surprising them with a decision based upon a different theory than they had assumed, surprised these appellants with a theory different than they had assumed; a theory which had been neither pleaded nor argued in the proceedings below and which had not been raised by appellees in their petition to the Commission for reconsideration of the Division 5 decision.

If it could be found upon the facts that the Commission did surprise appellees to the extent that they were denied a fair trial and that the Commission's decision was therefore invalid, it follows automatically that the lower court's decision must be found invalid for the very same reason.

Appellees could not have pleaded such a theory in the court below because it was never raised by them in their petition to the Commission for reconsideration of the Division 5 decision. The District Court erred in originating in its opinion a reason for setting aside the Division 5 decision which had not been presented to the Commission.

2.

The District Court's theory (that appellees were deprived of a fair trial before the Commission because they had no idea that both applications might be granted and perhaps would have presented a different case if they could have foreseen such a result) is erroneous in law and in fact.

Under the statute any applicant who files an application, and satisfies the Commission that he is fit, willing and able to render the service proposed and that public convenience and necessity require it, is entitled to the certificate requested. There has been no contention by appellees that they did not receive proper notice from each applicant detailing the rights sought. That alone was sufficient notice that each might succeed in its application and would bar any claim of surprise.

The evidence shows conclusively that the appellees, their counsel, and the witnesses on both sides did, in fact, foresee and assume that both might be granted, showing that the court below had no grasp at all of the factual situation and ruled contrary thereto.

3.

The finding that the Commission based its decision in each case upon evidence contained only in the other record is inconsistent with the lower court's opinion that "the evi-

dence commented upon as relating to Consolidated can be from the record in that case" and that the same is true with regard to O.N.C. Furthermore, no conclusion was drawn by the court from that finding.

The finding is unsupported by any factual examples or evidence and is erroneous in fact.

Appellees failed to furnish for the record the original decisions (the examiner's reports and recommended orders) in these two cases which were before Division 5 of the Commission on exceptions. Without the complete record before the Commission it was error for the court below to make such a finding of fact.

4.

There was an abundance of evidence before the Commission bearing upon Consolidated's ability, financial and otherwise, to conduct the proposed operations. The District Court's finding that there was none is a patent error.

The examiner's report in the case and Consolidated's appeal therefrom to Division 5, an important part of the record before the Commission which appellees promised to introduce, are not of record. Without them the court below could not know whether the question of Consolidated's ability was before Division 5 upon exceptions or whether the examiner's discussion indicated satisfaction upon that point. It was, therefore, error to assume that Division 5's

discussion, preliminary to its final findings, was insufficient.

Appellees, in their petition to the Commission for review and reconsideration of the Division 5 report, did not question either the sufficiency of the evidence or the findings with respect to Consolidated's ability and, therefore, could not have raised these points in the District Court (and they did not plead or argue them). It was therefore error to originate for appellees an issue which they had elected not to place before the Commission.

5.

The statute and the Rules of Civil Procedure gave Consolidated an unqualified right to intervene in the proceedings before the District Court. It was error on the part of that court to strike all affirmative defenses from Consolidated's answer before allowing it to intervene.

ARGUMENT

1.

THE DISTRICT COURT ERRED IN BASING ITS FINDINGS UPON A THEORY NEITHER PLEADED NOR ARGUED WITHOUT GIVING APPELLANTS ANY OPPORTUNITY TO BE HEARD UPON SUCH THEORY.

The District Court's opinion, when read as a whole, shows unmistakably the underlying theory which controlled

the result reached. Clearly the lower court based its decision mainly upon the idea that the appellees were denied a fair trial before the Commission because, according to the court, they thought that only one or the other of the two applications might be granted and had no idea that both might be allowed and perhaps would have presented a different case in opposition had they realized it.

That this theory is erroneous in fact is argued in the brief submitted by the United States and the Commission under the heading "APPELLEES WERE ACCORDED A FULL AND FAIR HEARING IN THE PROCEEDINGS BEFORE THE COMMISSION" and also in this brief under the next assignment. The point to be made here is that the lower court denied to these appellants a full and fair hearing in that it based its decision upon a theory which had neither been pleaded nor argued and which appellants had no occasion to anticipate and no opportunity to meet.

In this the District Court has done to appellants exactly that which it thought the Commission did to appellees and which it considered, in the case of the Commission, denial of a fair trial. It should follow that, if such a theory could be supported factually, the District Court's decision would have to fall along with the Commission's and for exactly the same reason.

Appellants were denied any trial before the District Court upon the issue which finally emerged in the opinion

as controlling. No such theory was pleaded or argued. Appellants had no way of knowing that the court would formulate such a theory and they had no opportunity to argue against it. Perhaps they would have put in other evidence or would have insisted that appellees present more of the record before the Commission had they suspected any possibility of such a result.

A defense which would have been available to appellants, had appellees pleaded such a theory, is the failure to place that issue before the full Commission. We think that the District Court had no jurisdiction to consider a point or points not raised in the petition to the full Commission. With respect to such matters it is stepping in between the full Commission and its subordinate division and trying issues which the Commission has never been asked to consider.

Congress has declared that the parties before the Commission must exhaust their remedies there before going to the courts. Title 49, U.S.C.A., Section 17 (9), provides as follows:

> "When an application for rehearing, reargument, or reconsideration of any decision, order or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside

> such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

It is evident from appellees' petition to the Commission (R. 2485) that only two points in issue here were submitted to the Commission. One was the "commingling", and the other the denial of a rehearing. The Commission has never considered this theory that appellees were denied a fair trial. And under the statute the appellees could not have brought such a theory to the District Court. Can that court circumvent the intention of Congress by originating a theory which appellees themselves could not have pleaded?

In *Chicago St. P. M. & O. Ry. Co. vs. U. S.*, 322 U. S. 1, this Court noted the failure of the plaintiffs below to put into evidence their petition to the Commission for reconsideration, (which was necessary to show whether or not they had therein claimed denial of a fair hearing before the Commission) and said: "The Court endeavors to protect the rights of parties to fair hearings, but it will not presume that their rights have been substantially denied when they do not embrace the opportunity to prove their grievance in the Court below." From this it appears that a failure to present such a question to the Commission would have deprived the plaintiffs of any standing on that point in the District Court.

2.

IN HOLDING THAT PLAINTIFFS BELOW WERE DEPRIVED OF A FAIR TRIAL BECAUSE THEY WERE GIVEN NO OPPORTUNITY TO DEFEND AGAINST THE GRANTING OF BOTH APPLICATIONS, THE DISTRICT COURT ERRED BOTH IN FACT AND IN LAW.

The following argument is intended only to supplement that contained in the brief of the United States and the Commission under the heading "APPELLEES WERE ACCORDED A FAIR HEARING IN THE PROCEEDINGS BEFORE THE COMMISSION."

The lower court's theory that appellees were deprived of a fair hearing before the Commission is evidenced by the following findings (which we have condensed as much as possible without obscuring the meaning):

IX The whole basis of the original proceedings was the question of whether any through-line should be allowed and, if so, which one. No notice was given to plaintiffs, or other protestants, to the general public or to the witnesses to the contrary. Records upon which the Commission's order are based were not made on the basis that two through-line operations might be allowed. There was no suggestion to anyone that such a result was possible until the issuance of the Commission's order.

XIV The report fails to disclose that it gave any consideration of possibility of adverse effect upon any plaintiff

of the institution of two through-line competitive operations.

XV No evidence was offered or submitted by any party nor requested or taken by the boards as to the effect upon the rights, duties or property of any plaintiff of the institution of two through-line operations. No plaintiff had a reasonable or fair opportunity to anticipate the necessity for the submittal of evidence as to such effect.

XVI Neither the witnesses nor the general public had any notice prior to said hearings or at any time before the Commission's order was issued that it was possible or probable that two through-lines might be authorized as a result of the proceedings.

XVII No opportunity was given to plaintiffs to maintain their rights or to present adequate protests and defenses to the institution of two through-line operations. (R. 74 et seq.)

These five findings all bear upon the same theory which obviously constituted the court's main ground for the result reached. We will hereinafter show that appellees did, in fact, realize that they were opposing two separate applications and that both might be granted, but, first, we wish to correct the assumption that two new through services were allowed.

The truth is that there formerly was one through service which was operated jointly by O.N.C. and Consolidated. The whole case before the Commission was made by each upon the theory that the joint through service, which had the cargo-carrying capacity represented by the combined

equipment of both, would be supplanted by two single-line operations. The number of trucks and trailers which each had needed to transport the total volume of through freight half way would suffice to transport half of it all the way (R. 1544). There would be some increase in cargo-carrying capacity because the equipment would be rolling during the time it had formerly been forced to stand idle at Medford (R. 1544).

Thus the factual picture put before the Commission was not whether "two new through" operations were to be added, but, rather, whether the one double-capacity joint-line through service should be replaced by two through single-line services. It can be said that after these certificates were issued two through services stood where there was but one before (an increase of one new through service) but, actually, the quantity of service to the public, when measured in the number of vehicles used, did not increase much, if any. The quality of the service, however, was vastly improved.

We have already pointed out that no appellee has ever said to the Commission or to the District Court that he was deprived of an opportunity to defend against two applications. It is easy, however, to show by record reference that appellees did, in fact, prepare and present their cases and conducted their cross-examination of the Consolidated and O.N.C. witnesses with clear realization that they were

opposing two separate applications and that both might be granted.

Each applicant proceeded strictly according to the statute to file an application for the extension which it wanted. The pertinent section of the Interstate Commerce Act is Section 307(a), U.S.C.A., which reads:

> "Subject to Section 310, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity;"

There is no contention by appellees that they did not receive separate notices from each applicant describing the extension sought by each, or that they failed to receive proper notice from the Commission as to the time and place of hearing to be held upon each.

As a matter of law, therefore, each applicant, upon a showing that it was fit, willing and able to conduct the proposed extension of its operations, and that public convenience and necessity existed, was entitled to a certificate. The statute was notice to appellees that each applicant, if it made the requisite showing before the Commission, would

be granted the rights which it requested. In fact, because each applicant had the statutory right to come before the Commission with his case and the Commission could not deny either of them before considering the proof offered, it would have been error for the Commission to notify the parties that consideration would be given to granting one or the other, but not both.

For this reason it is obvious that the District Court misunderstood the law and found contrary to the law when it said: "the whole basis of the original proceedings before the Joint Boards was the question of whether any through-line operation * * * should be allowed, and, if so, which one of the two separate applications."

In finding that "no plaintiff had a reasonable or fair opportunity to anticipate" that both applications might be granted, the lower court goes squarely against the evidence. The following excerpts show beyond doubt that appellees presented their opposing case with full knowledge of that possibility.

Mr. Farrens, counsel for the railroads and Pacific Truck Express, asked Mr. James, president of Consolidated, this question (R. 1571):

> "Now, I understood you on direct examination to express the opinion that if your application is granted and the application of the Oregon-Nevada-California Fast Freight is likewise granted, that the result would be that the two companies then will approximately

split the present business which is interchanged between them at Medford; is that correct?"

This shows clearly enough that, at that time, July 8, 1940 (R. 1504), more than three months before appellees started to put in their case (October 16, 1940 (R. 985)), counsel for these appellees had clearly in mind the possibility that both might be granted. Incidentally, it is appropriate to call attention to the fact that, insofar as concerns the certificates granted, the protestants before the Commission were the same in both cases (R. 10).

Mr. James also testified before all these parties on July 8, 1940, that he had no objection to the Commission also granting the O.N.C. application (R. 1579). A month later, August 7, 1940, Mr. Farrens, in cross-examining Mr. Gritsch, president of O.N.C., showed that he still had the possibility in mind (R. 887).

> "If the present traffic, which is interchanged between your line and Consolidated Freightways at Medford and Klamath Falls is divided between these two carriers in the event both applications are granted for extension, will there, in your opinion, be enough traffic to meet the operating expenses of all the schedules which are proposed by you and by Consolidated in its case?"

On that same day Mr. Gritsch was asked by a member of the joint board:

> "Mr. Gritsch, of the traffic that is moving at the present time, and assuming that both applications were

granted, have you any opinion to express as to the future division of that business?" (R. 845.)

Mr. Gritsch proceeded to give him an estimate based upon the assumption that both applications would be granted (R. 846).

All appellees and other protestants before the Commission, except counsel for Colletti Fast Freight, were present at these sessions and took part in the cross-examination. They surely would be estopped to say that the possibility that both applications might be granted never occurred to them. Mr. Glanz first entered his appearance for Colletti Fast Freight "as a protestant in both cases," October 15, 1940 (R. 939). In conducting his direct examination of Mr. Hasselbrock, manager of Colletti Fast Freight, Mr. Glanz asked this question (R. 1095):

> "Q. I wonder if you would state to the Joint Board what effect the granting of the present applications, or either one of them, would have upon the operations of Colletti Fast Freight in the territory which it serves."

A few minutes later, in arguing against an objection to the answer given by the witness, Mr. Glanz said (R. 1095):

> "I think he is merely telling what effect the granting of either one of these applications or both would have upon his service."

These questions and comments surely leave Mr. Glanz no room to contend that he did not anticipate that both applications might be granted.

The lower court includes in the supposed surprise, in addition to the parties, the witnesses and the general public. It says (Finding XVI, R. 80):

> "Neither such witnesses nor the general public had any notice prior to the said hearings or at any time before the Commission's order was issued that it was possible or probable that two through-line operations * * * might be authorized * * *."

In the opinion (R. 67) this thought had been developed by this language:

> "The Division did not consider, nor did they find whether the shippers, many of whom testified for the carrier with which they did business, would have taken the same stand had they known that they were to deal with competing carriers."

Dealing first with the notice to the general public which the lower court considered lacking, it should suffice to point out that there is no requirement in the law that publication be made by an applicant or the Commission. The statute provides (Sec. 306(b), Title 49, U.S.C.A.):

> "Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require."

There is nothing in the record from which the court could have inferred a failure on the part of either applicant

to comply with the regulations. The finding is simply without any foundation. The record does show that appellee Pierce Auto Freight Lines, Inc., sent out "somewhat less than a thousand" (R. 1333) letters to shippers notifying them of the filing of both of these applications and requesting them to testify in opposition to both (R. 1497). No general notice to the shippers was necessary, of course, but this evidence shows again that the lower court's findings disregard both the law and the facts.

The witnesses too, contrary to the lower court's findings of fact, were well aware that both applications were pending and that both might be granted. The following samples will suffice to show that the court below had no grasp at all of the factual situation. Mr. Marshall, a paper box manufacturer of Medford, called by appellee Pierce Auto Freight, said: "It looks to me if one of you get it, the other will too." (R. 1982.) Mr. Gregg, of San Francisco, testifying for O.N.C., said he expected also to support Consolidated's application (R. 614). The form of a cross-examination question put to Mr. Gregg by Mr. Farrens, who represented appellees Pacific Southwest Railroad Association and Pacific Truck Express, shows again the lower court's misapprehension of the facts:

> "Q. Mr. Gregg, let us assume that both of these applications are granted and that would result in each of these companies having through service instead of the interchange service now conducted by them, * * *." (R. 615.)

O.N.C. witness Brannon wanted his testimony to also apply in support of Consolidated's application (R. 745), as did Wilsey (R. 778) and Underhill (R. 794). Mr. McCabe was aware of Consolidated's application and would expect to give it some business too (R. 218). Many of the witnesses were asked whether or not they had knowledge of both applications. Those who did not were, in most instances, informed then and there and proceeded to testify with the full facts in mind.

A few responses given by Consolidated witnesses are as follows: Banning, of Portland, would like to see O.N.C. granted too (R. 1657); Jory, of Salem, would support the O.N.C. application (R. 1669); Compton, of Seattle, favored both (R. 1742); also Heydenburk, of Grants Pass (R. 1602), and Williamson, of Seattle (R. 1746); Kimsey, of Tacoma, intended to support O.N.C. (R. 1752). Mr. Duncan, of Seattle, said "if both of them were granted here for such an operation, it would certainly be an improvement * * *" (R. 1758). The support of the Eugene Chamber of Commerce was for both (R. 1774).

In the face of this proof (and the foregoing samples do not purport to represent all of the evidence), it is a mystery how the lower court, without the benefit of any pleading or argument, could have arrived at a finding that the witnesses were in ignorance as to the true facts and might have testified differently had they known that there were two

applications and that both might be granted. Had these appellants been given any notice that the lower court was formulating any such theory, they could have quickly pointed out the conclusive evidence against it and the lack of any support for it, but they had no such opportunity below.

3.

THE DISTRICT COURT'S FINDING THAT THE COMMISSION BASED ITS DECISION IN EACH CASE UPON EVIDENCE CONTAINED ONLY IN THE OTHER RECORD IS INCONSISTENT WITH ITS OWN OPINION, IS UNSUPPORTED BY ANY EVIDENCE AND IS ERRONEOUS IN FACT.

The brief submitted herein on behalf of the Commission and the United States covers the question of "commingling" with extraordinary care and thoroughness. These intervener appellants subscribe to that argument and have little to add to it.

In our statement of the proceedings below we pointed out that at the trial this question was singled out by the District Court as the only issue meriting argument. "That is the only point that I am interested in hearing you on." (Judge Fee, R. 136.) "But that is the key to this case as far as I am concerned, from what I have heard so far." (Judge McColloch, R. 137.) In closing, Mr. Hampson, of counsel for appellees, referred to it as "the real issue in this law-

suit." (R. 159.) The briefs of the parties which were thereafter filed are not in this record.

Apparently the appellants succeeded in convincing the District Court that each record was complete and needed no help from the other. In its opinion (R. 68-9), it said:

> "It is said by plaintiffs that the Commission took evidence out of the case upon one application and gave consideration thereto in the case upon the opposite application. Examination of the joint report and the records shows that the evidence commented upon as relating to Consolidated can be from the record in that case. The same observation is pertinent with regard to O.N.C. and the record in that case. Some general matters are referred to which might be pertinent to both records, but these are matters of ordinary observation. The situation of each of the plaintiffs was carefully considered in relation to the particular records in which each was concerned."

This observation is further supported by a statement of counsel for appellees:

> "* * * we are not claiming that there was not substantial evidence introduced which might have or probably would support the granting of either of these applications." (Mr. Ivers, R. 118.)

The lower court's finding Number X, however, contrary to the tenor of the opinion and appellees' admission, is:

> "The Commission considered the separate records as though the case was a consolidated one. Evidence which appeared only in one record was used by the

Commission to support general findings in the Report concerning both Consolidated and O.N.C. In each proceeding embraced within the Report and the Commission's order, evidence not offered or received in such proceeding and not a part of the record therein was drawn upon and considered by the Commission. The findings and conclusions in the separate proceedings are so commingled in the single report as to make it impossible to determine therefrom which record gives support to them." (R. 79.)

This finding is not carried into the Conclusions of Law. Not one of the conclusions can be said to touch upon it either specifically or by inference (R. 80-1).

If, as is indicated by the lower court's opinion and appellees' admission, each case can stand upon its own record, then each applicant, as a matter of law, was entitled to a certificate. This being so, if the Commission had considered in granting one application some evidence contained only in the other record (which we do not concede), it would have been harmless error.

In the same paragraph of the opinion which observes that each record is sufficient unto itself, the lowet court says:

> "Many instances can be quoted from the report to show that the finding, or conclusion, was based upon the records of the two proceedings without discrimination." (R. 69.)

If the failure of Division 5 to designate, by some symbol

or reference after every sentence, to which of the two separate records it was referring is a defect, it is a defect of form rather than substance. The Commission's report is entitled to a presumption of regularity and, in the absence of some evidence, it cannot be assumed that each applicant was getting benefit from evidence not in its record.

In this connection we respectfully call attention again to the fact that appellees undertook and promised to furnish the entire record before the Commission in these two cases. The opening paragraph of the Division 5 report reads as follows (R. 10):

> "The application in No. MC-9115 (Sub-No. 1) was the subject of a hearing before joint board No. 5 and the other applications were the subject of one before joint board No. 11. By stipulation of the parties, part of the record in one case was made part of the record in the other. As neither joint board was able to agree as to the recommendations to be made in any instance, the matters were referred to an examiner for further appropriate proceedings and the application in No. MC-9115 (Sub-No. 1) was the subject of one report and recommended order, and the other applications the subject of another. Exceptions were filed by each applicant to the order recommended in its respective case and protestants replied. The issues in these proceedings are interrelated and the applications will be disposed of in one report. Our conclusions differ from those recommended."

Thus it was only upon appeal from the separate original decisions that the Commission took the liberty of discuss-

ing the cases in a single report. The lower court finds that it is not possible to tell in all instances from the Division 5 report to which record reference is made. No doubt, if it had before it the decisions of the examiner, which are a part of the records which appellees promised to provide, it could reconcile everything. Perhaps those reports summarized each record separately and at length.

Although requested by the court to furnish a tabulation of examples showing that the Commission, in deciding one case, drew upon evidence contained only in the other record (R. 158), no examples have yet been pointed out. It is possible, of course, to point to a sentence and ask from which record it came, but that will not support a claim that the Commission improperly gave one applicant the benefit of the other's proof.

In *Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412, 428, plaintiff had presented claims to the Interstate Commerce Commission against defendant. The Commission had found for the plaintiff (21 I.C.C. 129) and directed further proceedings to determine the amount to be awarded. A subsequent report and order determined this amount (23 I.C.C. 480). In a suit to enforce the award, objection was made that the reports and orders did not contain sufficient findings to sustain an award of damages. The Court found, however, that they did in the following language:

> "Upon examining the reports as set forth in the record, we think they contain findings of fact which

> meet the requirements of the statute and the facts stated in the findings, if taken as prima facie true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matters and are not expressed in the terms which courts generally employ in special findings of fact. But there is no difficulty in separating the findings from the other matter or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say 'should be' because both were made in the same proceedings and the latter one affirmatively shows that it was made to supplement and give effect to the original." (See also *American Express Co. v. Caldwell,* 244 U. S. 617, 627.)

Here too the separate reports written by the examiner should be read together with the Division 5 report. Appellees, as we have hereinbefore pointed out, promised the full record before the Commission but failed to provide it.

In *Chicago St. P. & M. & O. Ry. Co. v. U. S.* 322 U. S. 1-3, this Court unanimously reversed a District Court decision which set aside a Commission motor carrier certificate. The following language indicates that the failure of the plaintiffs below to present the full record of the proceedings before the Commission was considered by this Court as a fatal failure of proof.

> "It is said that these actions withdraw the intermediate points from issue and threw the protesting parties off their guard and that they did not have opportunity for adequate hearing on the matters ultimately decided. However, after receiving the report of Divi-

sion 5 recommending granting, as was done, the railroads filed a petition for reconsideration. It is not in evidence. Whether surprise was claimed and evidence was indicated that could be added on rehearing we do not know. The Court endeavors to protect the rights of parties to fair hearings, but it will not presume that their rights have been substantially denied when they do not embrace the opportunity to prove their grievance in the court below."

4.

THE DISTRICT COURT ERRED IN FACT IN HOLDING THAT THE COMMISSION DID NOT FIND CONSOLIDATED ABLE TO OPERATE THE PROPOSED EXTENSION AND THAT THERE IS NO EVIDENCE TO SUPPORT SUCH A FINDING AND ERRED IN LAW IN CONCLUDING THAT THE LACK OF SUCH FINDINGS IS A MATERIAL JURISDICTIONAL DEFECT.

The brief of the United States and the Commission sets forth much of the evidence in Consolidated's record bearing upon its fitness and ability to operate the extensions which it was proposing. In the face of the hundreds of pages of testimony and exhibits dealing with that subject, the lower court's finding that "there is no evidence in either record to support such a finding" is incomprehensible.

Here again appellants have encountered, for the first time, in the lower court's opinion an issue of which they

had no notice whatsoever. Appellees did not plead any lack of evidence upon which to base a finding as to Consolidated's fitness and ability. Their only complaint was that the Commission, in weighing the evidence, had given both applicants the "benefit of doubt" (allegation X(3), R. 7).

Here also is an issue which appellees did not put before the Commission. Under the statute, as amended in 1940 (quoted ante p. 38), they could not have tried it in the District Court. Congress has given them the right to bring a suit "in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission" only after an application for rehearing, reargument, or reconsideration "of any decision" has been made and denied, or otherwise disposed of by the Commission.

Was the question of Consolidated's ability before Division 5 on exceptions? Appellees promised to furnish the complete record before the Commission (R. 102-3-4). The trial examiner's report which was appealed to Division 5 has not been offered. The appeal to Division 5 was taken by Consolidated and O.N.C. (R. 10). Consolidated's exceptions may not have brought this issue up to the Division. Appellees' failure to keep their promise deprived the court below of any basis for its finding that Division 5 erred in not discussing Consolidated's fitness and ability at more length before entering the final findings in the words of

the statute which were: "we find that . . . applicant is fit, willing and able properly to perform such service . . ." By the foregoing these appellants do not mean to concede that the preliminary discussion by Division 5 is not sufficient and we subscribe to the treatment of that question which is contained in the brief of the United States and the Commission.

In concluding upon this assignment, we respectfully submit that the District Court's voluntary finding that there was no evidence in the record to support a finding "that Consolidated is adequately equipped to establish and maintain the proposed through-line operations under any conditions" is so utterly contrary to fact that it is nothing short of astonishing. In the first place, Consolidated needed no additional equipment to effectuate its proposal (R. 1544). It already had terminals at San Francisco, Oakland and Sacramento and was constructing a new terminal at Oakland regardless of the outcome of its extension application (R. 1553). The abundance of other evidence proving fitness and ability has been sufficiently discussed in the Commission's brief.

5.

THE DISTRICT COURT ERRED IN STRIKING ALL AFFIRMATIVE ANSWERS FROM CONSOLIDATED'S BRIEF

Rule 24(a) of the Rules of Civil Procedure reads as follows:

> "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Rule 24(c), on Procedure, says:

> "A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

Consolidated qualifies as an intervener under both (1) and (2) of Rule 24(a). The statute, Title 28, Section 45a, supp., provides:

> "That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party."

Consolidated would be bound by the judgment and representation of its interests by the United States and the Commission might be inadequate. The rule obviously con-

templates a situation wherein the Government's answer may not adequately meet the threat to a carrier's operations and it is consistent with reason to say that it intends that the carrier shall be free to assert additional defenses.

Consolidated's motion for leave to intervene as a defendant was filed April 15, 1944, and states the grounds as follows (R. 54):

> "* * * on the ground that applicant's rights to operate in interstate commerce between San Francisco, California, on the one hand, and Medford and Klamath Falls, Oregon, on the other, is being attacked, and that the representation of applicant's interest by existing parties may be inadequate and the applicant is bound by a judgment in the action."

This motion was filed nine days before the answer of the United States had been filed (R. 48) and thirteen days before the trial (R. 102).

> "MR. SCHAFER: May I be heard upon the matter of timeliness? Your Honor will recall that the Government's time to answer this complaint does not expire until about May 3rd, and we are at the trial of this case really before the Government's time to answer has expired. And we expected to be able to wait until that time, at any rate, before we intervened. We filed our intervention as soon as the case was set down for trial.
>
> JUDGE FEE: Both parties will be permitted to intervene insofar as the issues are concerned that are already made up in this case. That is, you can file an answer with admissions and denials to the petition, but

> the affirmative defenses which are set up will not be considered by the Court and are stricken from the amended answer, and it will be permitted to be filed when they are eliminated. We will now treat it as though it were filed.
>
> MR. SCHAFER: Save an exception, please." (R. 110.)

There can be no question that it was filed in time. There is no question that the statute and the Rule gave to Consolidated an unqualified right to intervene and defend. The District Court's arbitrary act in insisting upon qualifying that right before allowing intervention was unquestionably error. However, because the findings did not sustain appellees' complaint in regard to the negative wording in the Division's report, we can claim the error as prejudicial only in one particular. That was the striking of Consolidated's defense in which it was alleged that the plaintiffs below were guilty of laches in failing to challenge the Commission's final decision until approximately six months after the operations had been commenced by Consolidated (R. 59). The merits of this defense need not be discussed here. The error lies in depriving Consolidated of any opportunity to offer proof upon it.

CONCLUSION

Wherefore, for the reasons given herein and in the brief of the United States and the Interstate Commerce Com-

mission, these intervener appellants pray that the decree of the District Court be reversed with directions to dismiss the complaint.

Respectfully submitted,
on behalf of
Oregon-Nevada-California Fast Freight, Inc.
and
Consolidated Freightways, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within brief upon each of counsel for appellees herein as follows:

By personally delivering a copy to the office of Wm. P. Ellis, Attorney, Public Service Building, Portland, Oregon, counsel for appellees, Pierce Auto Freight Lines, Inc., and Angelo Colletti, doing business as Colletti Fast Freight.

.....

By personally delivering a copy to the office of Alfred A. Hampson, Attorney, 800 Pacific Building, Portland, Oregon, counsel for appellees Pacific Southwest Railroad Association and Pacific Motor Trucking Company.

.....

By mailing a copy, first class mail, registered, return receipt requested, to Henry T. Ivers, Attorney, Hoge Building, Seattle, Washington, counsel for appellee Los Angeles-Seattle Motor Express.

DONALD A. SCHAFER.

Dated at Portland, Oregon,
January 5, 1946.